United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

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74-1410

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

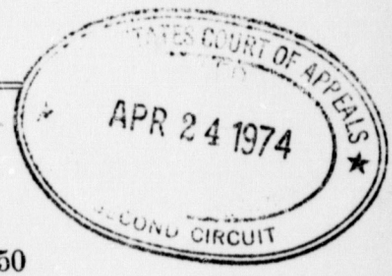
against

ANDREW FUREY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT.



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BRIEF OF THE APPELLANT.

STATEMENT OF ISSUES.

There are two issues presented on this appeal. The first is whether or not the charges should have been dismissed against this defendant for the failure of the government to bring him to trial within six (6) months. The second issue presented is whether or not the evidence should have been suppressed upon motion.

STATEMENT OF THE CASE.

On December 19, 1972, defendant was arrested at his mother's home in North Babylon, New York and was arraigned the same day in the Eastern District Court in Westbury. He was charged with a violation of Title 21, United States Code, Section 841 (a) 1.

On December 20, 1972, the defendant was released on bail. Following this, by letter of June 18, 1973, the defendant was advised to appear in Court on June 21, 1973. At that time, the defendant consented to be prosecuted as a juvenile delinquent. The document signed by him on June 21, 1973 recites the identical charge set forth in the initial arraignment.

There was no activity on the case until defendant's counsel was notified to attend a pre-trial conference on December 13, 1973, before Judge Dooling.

At the pre-trial conference, a motion to dismiss was made orally and Judge Dooling directed that this be done on papers returnable on December 20, 1973.

A hearing was conducted pursuant to this motion on December 24, 1973 and the motion to dismiss was denied by memorandum and order filed on December 27, 1973.

On January 2, 1974, a stay was denied by Judge Dooling and was also denied by Judge Friendly. A hearing was conducted on January 2nd and 3rd on the motion to suppress certain evidence and this motion was also denied.

It was then stipulated that the Court could make a judgment based upon the evidence which had been brought out on the motion to suppress. The defendant was thereupon convicted of juvenile delinquency.

On March 8, 1974, he was sentenced to be committed to the custody of the Attorney General for his minority.

POINT I.

THE CHARGE SHOULD HAVE BEEN DISMISSED PURSUANT TO THE RULES OF THE COURT GOVERNING SPEEDY TRIALS.

The defendant was arrested on December 19, 1972. On December 27, 1973, Judge Dooling denied the motion to dismiss for failure to provide a speedy trial. On June 21, 1973, the defendant consented to be prosecuted as a juvenile.

Judge Dooling found "the case appears to be one presenting no particular trial problems from the government's point of view, its witnesses are available and no trial problems have, at any time, been anticipated".

The Court found, however, that the six (6) month period should be measured from June 21, 1973, the date of the consent to be prosecuted as a juvenile. The notice of readiness for trial was filed on December 21, 1973.

It is ironic that should this decision remain undisturbed, we find this boy facing two (2) years of imprisonment where if he were an adult he would be released.

The prompt disposition of criminal charges has been determined to be of overwhelming public importance. In this respect there is some analogy with our rule of reasonable doubt since in both cases, it is implicit in the rule that an occasional malefactor will regain or retain his liberty.

> "Because of the exceptional importance of the issue at the time when the petition was filed, we heard the petition *en banc* (see F. R. App. P. Rule 35 [a][21]).[2] We conclude that such a dismissal is with prejudice and that mandamus is the appropriate remedy in this case. Accordingly, we order the writ granted and the second indictment dismissed." *Hilbert v. Dooling*, 476 F 2nd 355.

The Court states further in the *Hilbert* case:

> "Rule 4 provides that 'the government must be ready for trial within six (6) months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge * * * whichever is earliest. *If the government is not ready for trial within such time, or within the periods as extended by the District Court for good cause under Rule 5, * * * the charge shall be dismissed*' (italics added). The onus on the prosecution is somewhat alleviated by Rule 5, which authorizes the District Court to grant extensions of the six-month period where justified by reason of such circumstances as other 'proceedings concerning the defendant,' the unavailability of material evidence, the unavailability of the defendant, or '[o]ther periods of delay occasioned by exceptional circumstances.' However, the government is put on notice that if it does not comply with the rules, which provide ample leeway for the legitimate needs of preparing a prosecution, it will be foreclosed from proceeding with the prosecution."

It is obvious that none of the exceptions set forth in the rule applied to this case and under the clear language of the *Hilbert* case, this defendant is entitled to have the time measured from the date of his arrest. There is a clear analogy between the case at bar and *Hilbert* in that there was an attempt made by the District Court in that case to measure the six (6) month period from a subsequent event, that is the superceding indictment. The juvenile defendant in this case should be entitled to no less than was Mr. Hilbert.

The case of *United States v. Pierro*, 478 F 2nd 386 is not to the contrary. The Court held at page 388:

> "It would be inconsistent with the intent of the Circuit Council which drafted the Rules, and with sound public policy, to free the Government from the responsibility of communicating its readiness for trial to the court. The purpose of the Rules, as announced in the Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, is to protect 'the interest of the public and the rights of the defendants * * *, through a firm control of criminal prosecutions by the district courts * * *' (emphasis supplied)."

In the *Pierro* case, a statement of readiness was delivered to the judge. It is stated at page 389:

> "The critical factor here is the discovery of the Government's notice of readiness in Judge Costantino's files. Although clearly the better practice is for the Government to file its notice with the court clerk, the purpose of the notice of readiness, as we have already intimated, is to inform the court that the case is ready for trial. That purpose was served in this case. Although Judge Costantino does not indicate when the notice of readiness was delivered to his chamber, we conclude that the only reasonable inference to be drawn from the concededly extraordinary circumstances here involved is that the notice was received on or about May 23, 1972, the date which appears on the original notice of readiness and on the affidavit of service. Thus, the Government had every reason to believe that it had discharged its obligation--under Rule 4--albeit not in the best manner--to communicate its readiness to the court."

The notice of readiness in this case was not filed until December 21, 1973, one year and two days after the arrest.

In the case of *United States v. Scafo*, 480 F. 2nd 1312 (1973). A similar question arose as to the interpretation of these rules. This Court held:

> "The narrow issue on this appeal is whether in computing the six-month period within which the government must be ready for trial pursuant to Rule 4 of the Prompt Disposition Rules, such period begins on the date of arrest or on the date of promulgation of the prompt disposition rules. We hold in accordance with the plain language of Rule 4 itself, that the six month period begins with the date of arrest."

This would seem to apply equally to the facts in our case. In view of the one year's delay in this unexceptional case, the charge should be dismissed.

POINT II.

THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

It appears from the testimony of the agents involved in the raiding party that within minutes after the house was entered, the contraband was thrown from a window and was seized by them.

Despite the fact that this material was already in their possession, an affidavit for a search warrant was submitted to Judge Travia at about 10:30 A.M., approximately one and one-half hours later. Subsequently, certain documents were seized by the agents in the house. This was allegedly pursuant to the search warrant when it arrived.

Judge Dooling credits the testimony of incredible restraint on the part of the agents in waiting for the warrant. If this, in fact, occurred it was pursuant to a search warrant which was fraudulently obtained from the Court.

If, in fact, the search took place before the arrival of the warrant, it was equally illegal and the documents should have been suppressed.

CONCLUSION.

THE CHARGE SHOULD BE DISMISSED OR IN THE ALTERNATIVE, THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

Respectfully submitted,

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JAMES M. FUREY, ESQ.,
Of Counsel.

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Attorney for